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In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY,
on behalf of itself and the class it represents,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE CAMPBELL COUNTY, WYOMING IN SUPPORT OF PETITIONERS AMOCO PRODUCTION COMPANY, ET AL.

MICHAEL D. FULLER
Campbell County Attorney
500 S. Gillette Ave.
Suite 112
Gillette, Wyoming 82717
307-682-4310

S. THOMAS THRONE
Counsel of Record
2 North Main, Suite 402
Sheridan, Wyoming 82801
307-672-5858

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Campbell County, Wyoming, a governmental entity, by and through the undersigned Counsel files this amicus curiae brief in support of the defendant class' appeal filed by Amoco Production Company.[1] The Tenth Circuit's holding in *Southern Ute Indian Tribe v. Amoco Production Company*, 151 F.3d 1251 (10th Cir. 1998), is of grave concern to Campbell County, Wyoming because it changes ownership rights in approximately 400,000 acres of land in the county which are owned by residents of the county. Failure to reverse the decision of the Tenth circuit holding that the United States reserved coalbed methane, as well as coal in the 1909 and 1910 Coal Lands Acts, will have a devastating economic impact on the local institutions and on the individual residents of Campbell County, Wyoming. Campbell County, Wyoming therefore respectfully requests that the United States Supreme Court reverse the Tenth Circuit's decision regarding the ownership of coalbed methane.

INTEREST OF AMICUS CURIAE

Campbell County, Wyoming is located in the center of the Powder River Basin in northeastern Wyoming and borders Montana. Gillette is the county seat and largest town in the county. Mineral development has been, and

[1] Campbell County, Wyoming is a county and files this brief pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States. None of the parties authored this brief. The brief was authored by counsel of record.

is, of vital importance to Campbell County. According to the BLM records, there are approximately 400,000 acres in Campbell County patented under the 1909 and 1910 Coal Lands Acts and approximately 1.4 million acres in Campbell, Sheridan and Johnson Counties.[2] Campbell County is located in the coal and petroleum rich Powder River Basin. A large portion of the economic activity in Campbell County involves natural resources development. Wyoming is the largest coal producing state in the United States and Campbell County is the largest coal producing county in Wyoming. Because the Powder River Basin in Campbell County is a mature basin for oil and gas exploration, coalbed methane exploration and development is vital to the future of the local economy.

The decision of the Tenth Circuit is of extraordinary concern to the county because in one decision, the Tenth Circuit changed ownership rights in coalbed methane gas in 400,000 acres of land in Campbell County alone. The Tenth Circuit ruled that coalbed gas "was reserved to the United States" when Congress reserved "coal" under the 1909 and 1910 Acts.[3] This ruling is not confined to the coal owned by the Southern Ute Indian Tribe; followed to its logical conclusion, the decision affects the ownership of

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[2] Information regarding the amount of acreage obtained from the Buffalo, Wyoming Resource Office of the BLM. Campbell, Sheridan and Johnson Counties comprise most of the Powder River Basin in which coalbed methane production exists and is anticipated in the future.

[3] Act of March 3, 1909, 35 Stat. 844 (30 U.S.C. § 81) ("the 1909 Act"); Act of June 22, 1910, 36 Stat. 583 (30 U.S.C. § 85) ("The 1910 Act"), (collectively known as the "Acts" or "Coal Lands Acts").

coalbed gas in 16 million acres of land patented under the 1909 and 1910 Acts across the West.[4] According to the decision, mineral owners who own all oil and gas in lands as successors-in-interest to the patentees under the 1909 and 1910 Coal Lands Acts do not own the coalbed gas.

For over eighty years, the patentees and their successors have conducted business believing gas was gas and not included as part of the coal. Because of Public Law 105-367, the mineral owners who were fortunate enough to have obtained production or executed leases, prior to October 21, 1998, have some relief. However, for those who do not have production, but have executed a lease, the protection expires when the lease expires under the current state of the law. Mineral owners who were not fortunate to have their lands under lease on October 21, 1998, lost their rights to any coalbed methane production.

If the Supreme Court does not reverse the Tenth Circuit Court of Appeals decision, the residents of Campbell County will be stunned by the taking of their mineral interests by the Federal Government without notice and without compensation.

SUMMARY OF THE ARGUMENT

The plain meaning of the terms of the Acts should be used in determining the intention of Congress when it enacted the Coal Lands Acts of 1909 and 1910. The meaning of "coal" in 1909 and 1910 is the same as it is now, a

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[4] U.S. Dept. of Interior, Bureau of Land Management, Public Land Statistics, 1993, p. 16.

solid black substance to be recovered as a solid and not a gas. Coal was reserved by the United States in 1909 and 1910 because coal was valuable to the United States. Coalbed methane was a waste by-product which Congress could not have intended to reserve.

The history of the United States and the West supports the conclusion that Congress did not intend to reserve coalbed methane when it reserved coal under the 1909 and 1910 Coal Lands Acts. The availability and use of the solid coal was significant in establishing the route of the Union Pacific Railroad across southern Wyoming. The mining of the coal provided fuel for the steam engines and freight for the trains. Coalbed methane, on the other hand, caused mine explosions which resulted in the worst coal mining disasters in Wyoming in 1903 and 1908. Congress knew coalbed methane was dangerous, therefore, Congress could not have intended to reserve coalbed methane with the coal in 1909 and 1910.

Campbell County, Wyoming and its residents will suffer economic impact if the Tenth Circuit decision is not reversed. The discovery and development of coalbed methane was undertaken with the understanding that coalbed methane belonged to the patentee and that development should be honored. Any protection offered by Public Law 105-367, 112 Stat. 3313 (1998) will be short-lived upon the expiration of contracts and leases existing as of October 21, 1998.

Campbell County requests that the Supreme Court of the United States reverse the decision of the Tenth Circuit Court of Appeals regarding the ownership of coalbed

methane for lands patented under the 1909 and 1910 Coal Lands Acts.

ARGUMENT

I. CONGRESS COULD NOT AND DID NOT INTEND TO RESERVE COALBED METHANE WHEN IT RESERVED COAL UNDER 1909 AND 1910 COAL LANDS ACTS.

The controlling intent is the intent of the Congress that actually passed a particular statute being interpreted. "[T]he pertinent inquiry in the case is the intent of Congress when it granted land to Union Pacific in 1862". *Leo Sheep Co. v. United States*, 440 U.S. 668, 681 (1979). When looking at the language of the statute, a court must "assume" that congressional intent is reflected by the ordinary meaning of the words used, *United States v. Labonte*, 520 U.S. 751, 177 S.Ct. 1673, 1677 (1997). The Supreme Court has ruled that when Congress does not define a term in a statute, that term is to be construed in accordance with the ordinary meaning. *United States v. Smith*, 508 U.S. 223, 228 (1993).

In statutory interpretation, the court "look[s] to the plain language of the statute and give[s] effect to its meaning", *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer Inv. Servs. v. Brunswick Assocs.*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *accord Consumer*

Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). The "ordinary meaning" of an undefined statutory term is the meaning in existence when Congress enacted the statute. *Perrin*, 444 U.S. at 42.

Applying these principles to the Acts, Congress expressed its intent to reserve "coal" in patents issued under the Acts. Because Congress did not define the word "coal," it must be construed in accord with its "ordinary, contemporary, common meaning" at the time Congress passed the Acts. *Pioneer Invs. Servs.*, 507 U.S. at 388; *Perrin*, 444 U.S. at 42. The ordinary and common meaning of "coal" when Congress passed the Acts was "a black, or brownish black, *solid*, combustible mineral substance." *Webster's New International Dictionary of the English Language* 424 (1916) (emphasis added). Other sources of the day define "coal" as a black or brownish black solid combustible mineral substance. *See also The Century Dictionary and Cyclopedia* 1067 (1906) ("A *solid* and more or less distinctly stratified mineral, varying in color from dark-brown to black, brittle, combustible, and used as a fuel.") (emphasis added); *The Universal Encyclopedic Dictionary* 945 (1905) ("A carbonaceous mineral substance, black, shiny or dull, easily broken, often splintery, inflammable, and used for fuel.").

The popular and common understanding of "coal" as a black or brownish black solid combustible mineral substance has been consistent from the time of the Acts to the present. *See, e.g., The Shorter Oxford English Dictionary* 330 (1936) ("A mineral, *solid*, hard, opaque, black or blackish, found in seams in the earth, and largely used as a fuel.") (emphasis added); *Webster's New International Dictionary* 511 (2d ed. 1958) ("A black, or brownish-black, *solid*, combustible substance formed by the partial decomposition of vegetable matter without free access of air.") (emphasis added); *Webster's Third New International Dictionary* 432 (1986) ("A black or brownish black *solid* combustible mineral substance.") (emphasis added).

Turning to the issue before the Court, Congress' unqualified use of the word "coal" means that Congress reserved the black or brownish black solid combustible mineral substance commonly known as "coal" in patents issued under the Acts. *See Pioneer Invs. Servs.*, 507 U.S. at 388; *Perrin*, 444 U.S. at 42. Coalbed gas is neither black or brownish black nor is it a solid. The word coal thus does not include coalbed gas. No one has identified a definition of "coal" that includes coalbed gas. Coalbed gas instead falls within the ordinary and popular definition of "gas" as "an aeriform fluid, having neither independent shape nor volume, but tending to expand indefinitely." *Webster's New International Dictionary* 892 (1916).

In 1909 and 1910, Congress expressed its intent in unambiguous terms. Patents issued under the Acts reserved to the United States the black or brownish black solid combustible mineral substance commonly known as "coal." Congress conveyed coalbed gas and all other minerals that do not fall within the ordinary and popular meaning of "coal" to the patentees. The word "coal" in the Acts thus unambiguously excludes coalbed gas. That language is conclusive on the issue before the Court. *E.g., Consumer Product Safety Comm'n*, 447 U.S. at 108. Congress did not reserve coalbed methane gas.

II. A REVIEW OF HISTORY OF THE UNITED STATES AND THE WEST CLEARLY INDICATES THAT CONGRESS COULD NOT HAVE INTENDED TO RESERVE COALBED METHANE IN 1909 AND 1910. CURRENT TREATMENT OF COALBED METHANE CONFIRMS THE HISTORICAL INTENTIONS.

In 1909 and 1910, the United States reserved coal because it was a necessary and useful source of energy for the development of the country. American History texts and sourcebooks taught in our public schools emphasize that coal and steel were the foundations of American Industry. In discussing the growth in the United States following the civil war, a Smithsonian historian wrote, "Coal deposits provided fuel for steam engines and furnaces of the iron industry", Herman J. Viola, *Why We Remember, United States History, Civil War to the Present*, at page 262. Another historian wrote for our school children, "the industrial age would not have been possible without abundant deposits of coal and iron which could be turned into steel". Gerald A. Danzer, et al., *The Americans*, at page 411. In the chapter discussing "The Rise of Industry", the authors stated "large deposits of coal fueled the nations steel mills". James West Davidson, Michael B. Stoff, *American Nation*, at page 543. Congress clearly considered the nation's best interests when it decided in 1909 and 1910 to reserve the solid coal that was critical to the economic development of the nation at the beginning of this century.

At the time the Coal Lands Acts were enacted, the solid coal was a valuable resource to the country and to Wyoming in particular. Coal was produced in Wyoming

before the Wyoming territory was established in 1869. The easy access to coal reserves heavily influenced the Union Pacific decision in the 1860's to build its railroad through Wyoming. Roy A. Jordan and S. Scott DeBoer, *Wyoming a source book* at page 169, T.A. Larson, *Wyoming, a History*, at 144. The solid coal was valuable and consequently Congress reserved the coal when passing the 1909 and 1910 Acts.

Coalbed methane gas, on the other hand, was neither useful nor desired when the United States reserved coal. Many Wyoming underground coal mines in the nineteenth century had fires burning "out of control" in them for years. Most of these fires were ignited by spontaneous combustion of gas that had collected in the mines. Jordan, et al., *supra at* page 198. In two separate explosions, one on June 30, 1903 and one on March 28, 1908, a total of 228 miners died in Hanna Mine #1 in southern Wyoming. The 1903 explosion was the worst mine disaster in Wyoming's history. Jordan, et al., *supra at* page 167. Because of the hazards of the methane in the coal in Wyoming at the time the Coal Lands Acts were enacted, as evidenced by the two accidents, Congress would not have intended to reserve the coalbed methane when it reserved coal in 1909 and 1910. Congress could not have intended to reserve a harmful by-product when it reserved the valuable coal in 1909 and 1910. Taken from another perspective, Congress clearly knew that coalbed methane existed because of these disasters, yet, they did not specifically express an intention to reserve the coalbed methane gas. Because Congress knew the existence of coalbed methane gas and did not mention it in the reservation, Congress clearly did not intend to reserve the coalbed methane gas.

For as long as there has been mineral activity in the Powder River Basin, all mineral owners, including owners of coal rights, have transacted business using the clear and obvious definitions set forth above. Simply put, coal is coal and gas is gas and the coalbed gas industry has developed in Campbell County and elsewhere on the basis of this distinction. As a gas, coalbed gas has always been widely viewed as a part of the oil and gas estate that may be leased by the gas estate owner in a standard oil and gas lease. The Wyoming Oil and Gas Conservation Commission (WOGCC), the administrative agency which regulates oil and gas exploration in Wyoming,[5] issues permits to drill for coalbed methane wells. The WOGCC has held hearings regarding the best spacing density for the development of coalbed methane wells. The mineral owners, the coalbed producers as well as the administrative agency, treat coalbed methane as a natural gas belonging to the patentee, and not part of the coal owned by the United States.[6] Coalbed gas has not been treated in Campbell County as part of the coal estate because by definition it is not coal; nor, have coal owners purported to lease the right to develop coalbed gas in coal leases. This practice fits with the reality of coalbed gas development: it is drilled for, produced, and transported to market in pipelines just like any other gas. From wellhead to burnertip, coalbed gas is gas.

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[5] *See* Wyoming Stat. § 30-5-101 et seq. (1977).

[6] *See* Wyoming Oil and Gas Conservation Commission Website – http//www.wogcc.state.wy.us.

III. MINERAL OWNERS AND OIL AND GAS EXPLORATION COMPANIES HAVE RELIED UPON THE HISTORICAL TREATMENT THAT COALBED METHANE IS GAS AND THEREFOKE IS INCLUDED IN THE GRANT TO THE PATENTEES.

Campbell County's coalbed gas resources are enormous. Over the last six years, coalbed gas leasing, exploration, drilling, and production in Campbell County has grown from virtually nothing into a major economic activity. The activity has been undertaken under the belief that coalbed methane gas belonged to the patentee or its successors under the 1909 and 1910 Coal Lands Acts. Coalbed methane development is the most active exploration activity currently underway in Campbell County. For example, between July 1996 and June 1997, when all parties were operating under the commonly held belief, 672 applications for permits to drill coalbed gas wells were filed for drilling on federal, private, and state lands in Campbell County.[7] [8] During this same period, Campbell County ranked as the top county in the Rocky Mountain Region for coalbed gas permitting and drilling activities.

Approximately 400,000 acres of land in Campbell County were patented under the 1909 and 1910 Acts construed by the court in the Tenth Circuit decision. The mineral owners in Campbell County are ordinary people

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[7] *See* Wyoming Oil and Gas Conservation Commission Website – http//www.wogcc.state.wy.us.

[8] *Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816 (10th Cir. 1997). This decision was issued in July 1997.

and make up a diverse group – ranchers, working people, public employees, large landowners, small landowners, widows, and retired people. Many mineral owners are descendants of the original patentees. Because Congress reserved only the solid mineral coal under the 1909 and 1910 Acts and conveyed all other minerals to the patentees, Campbell County landowners who own lands patented under the 1909 and 1910 Acts own all oil, gas and other minerals, except coal in their lands.

From the beginning of the coalbed gas exploration and development boom in Campbell County, everyone – petroleum companies, mineral owners, landowners, coal mining companies, and the state and federal governments – has treated coalbed gas as owned by the oil and gas estate owner. The original development of coalbed methane occurred because of oil and gas leases from mineral owners who received their interest under the 1909 and 1910 Coal Lands Acts. This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned. *Leo Sheep Co.* at 688. The entire coalbed gas industry rests on the basic foundation that coalbed methane is a part of the oil and gas estate and naturally passed on to the patentees. Until the Tenth Circuit decision, Campbell County residents relied upon this basic understanding of property law. The growth of the coalbed gas industry has greatly affected and impacted Campbell County mineral owners who own the oil and gas estate in their lands, including those who own some of the 400,000 acres patented under the 1909 and 1910 Acts.

Campbell County and its residents see the resolution of this issue as straightforward and uncomplicated. Wyoming mines more coal than any other state, producing 20% of the nations total coal output. In 1993, Campbell County mines produced 181.9 million tons of the 209.9 million tons mined in Wyoming. Jordan, *supra* at 165. All of the coal mined in Campbell County is mined using open pit surface mines. Virtually all the residents of Campbell County are familiar with coal. Coal is the solid black substance shoveled by a dragline into trucks that haul the coal from the pit to be loaded on to trains which then transport the solid coal to a distant power plant. No one concludes that the black solid substance is a "gas".

IV. THE DECISION WILL HAVE SEVERE ADVERSE IMPACT ON CAMPBELL COUNTY TAX REVENUES.

The adverse impact on the tax revenues of Campbell County resulting from the Tenth Circuit Court of Appeals' decision is enormous.

Mineral owners execute oil and gas leases to exploration companies, granting the right to explore for oil and gas to the exploration companies. The mineral owner reserves a portion of the revenue free of cost in exchange for the right to explore for oil, gas or other minerals. The amount reserved by the mineral owner is commonly referred to as the "royalty" interest. If the mineral rights are owned by the patentee or its successors, the royalty is paid to the fee mineral owners. If the mineral rights are owned by the United States, the federal government receives the royalty payment.

Campbell County receives an ad valorem (property tax) revenue in the amount of 5.97% of the value of production on royalty paid to fee mineral owners.[9] Campbell County does not and cannot receive tax revenue for Ad Valorem Tax on royalties paid to the United States. The tax revenue lost if the royalty payments are made to the United States rather than to the patentees is significant. Assuming 50% of the acreage subject to the 1909 and 1910 Acts is productive, and assuming that 50% of the productive acreage is unleased, there are 100,000 acres still subject to the Southern Ute Indian decision in Campbell County alone. (400,000 x .5 = 200,000; 200,000 x .5 = 100,000). Currently, one well is being drilled on each 40 acre tract in Campbell County, Wyoming. Therefore, there are 2,500 potential drill sites on unleased acreage. The average daily production rate of a coalbed methane ("CBM") well in the Powder River Basin on every 40 acre tract is 200 mcf (200 thousand cubic feet) per well per day.[10] Based upon an examination of the records in the Campbell County Clerk and Recorders Office,[11] the average royalty reserved on leases from fee mineral owners is 15% of the value of the production. The average price for coalbed methane for 1998 has been $1.80/mcf. Therefore, the *Southern Ute* decision will cost Campbell County tax revenue of $2,941,717/year [(200/mcf/day x $1.80 (price/

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[9] *See* portions of the 1998 Wyoming Property Taxation prepared by the Wyoming Taxpayers Association lodged with the Clerk of the United States Supreme Court.

[10] *See* Wyoming Oil and Gas Conservation Commission Website – http//www.wogcc.state.wy.us.

[11] Examination made by counsel of record for Campbell County, Wyoming.

mcf) x .15 (royalty rate) x .0597 (tax rate) x 365 (days per year) x 2500 (number of wells)].[12]

With oil prices and coal prices falling, production of coalbed methane is necessary to maintain Campbell County's tax revenues. In 1997, 18.22% of Campbell County's tax revenue was from ad valorem taxes on oil and 58.06% of the tax revenue was from ad valorem tax on coal production. The value of these commodities is decreasing and consequently, the tax revenues to the County are decreasing. The valuation on coal decreased $61,464,820 or 6.5% from 1997 to 1998 and the valuation of oil decreased $48,333,619 or 15% from 1997 to 1998. Valuations are based on prior year prices. With current prices declining, next year's valuations will be even lower for oil and coal. In the same time frame, natural gas valuation rose from $29,135,435 in 1997 to $42,761,158 in 1998, an increase of $13,625,723 or 46.7%.[13] Almost all of this increase in natural gas valuations is due to new coalbed methane production. With the value of the other commodities declining, increased tax revenue from coalbed methane development is critical to Campbell County government functions.

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[12] Using the same formula for the approximate 1.4 million acres subject to the decision in Campbell, Sheridan and Johnson County, will cost the counties a combined total of $10,347,750 in lost tax revenue [1,400,000 x 5 = 700,000; 700,000 x .5' 350,000. 350,000 ÷ 40 = 8,750 wells, 200 mcf/day x $1.80 x .15 x .06 x 365 x 8,750 = $10,347,750].

[13] *See* portions of the 1997 and 1998 Wyoming Property Taxation prepared by the Wyoming Taxpayers Association lodged with the Clerk of the United States Supreme Court. All revenue data was obtained from these publications.

In addition to the tax revenue to the Campbell County treasury, the impact of coalbed methane is significant to the residents of Campbell County. The fee mineral owners are receiving royalty checks, revenues that will be spent in the county. If the revenue goes to the federal government, local citizens will not spend it in the local economy, thus creating an additional loss of revenue to Campbell County.

CONCLUSION

Using the plain meaning of the word "coal" as it was used in 1909 and 1910, statutory interpretation clearly indicates that Congress intended not to reserve coalbed methane. Historical analysis of the use of coal and the dangers of coalbed methane confirms the statutory analysis that Congress could not have intended to reserve coalbed methane when reserving coal in 1909 and 1910.

Campbell County, Wyoming respectfully asks that the Supreme Court of the United States hold that Congress reserved only the solid rock fuel commonly known as "coal" under the 1909 and 1910 Coal Lands Acts, but not natural gas in coal formations.

Respectfully submitted,

S. THOMAS THRONE
Counsel of Record
P. O. Box 1056
Sheridan, WY 82801
(307) 672-5858